IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1556

DOROTHY BERG, MARYJANE O'SHEA, ANN LALLY, ANGELINE P. CARUSO, OTHO M. ROBINSON, JAMES F. REDMOND, MANFORD BYRD, JR., AND UNKNOWN DEFENDANTS,

Petitioners,

vs.

IDA BERGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.*

Petitioners, Dorothy Berg, *et al.*, pray that a writ of certiorari issue to review the judgment and opinion of a divided panel of the Court of Appeals for the Seventh Circuit entered on December 20, 1977, reversing and remanding the decision of the United States District Court for the Northern District of Illinois, Eastern Division. A petition for rehearing by the petitioners was denied January 31, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court was an unpublished order not to be cited per Circuit Rule 35 of the United States Court of Appeals for the Seventh Circuit. This unpublished order and dissenting opinion are reproduced in Appendix A to this Petition at p. A1.

The order and judgment of the District Court was not reported. It is reproduced in Appendix A to this Petition at p. A11. The order of the Court of Appeals of January 31, 1978, denying petitioners' motion for rehearing with the footnote that Circuit Judge Wilbert F. Pell voted to grant a rehearing is reproduced in Appendix A to this Petition at p. A12.

JURISDICTION.

The decision of the Court of Appeals was entered on December 20, 1977. A petition for rehearing was denied on January 31, 1978. The jurisdiction of this Court is invoked under the provisions of 28 USC § 1254(1).

QUESTIONS PRESENTED.

1. Whether or not the decision of the Court of Appeals holding that a plaintiff's liberty interest under the due process clause of the Fourteenth Amendment was violated when the general superintendent of schools pursuant to Illinois statute reported the specific reasons for plaintiff's dismissal as a non-tenured probationary school teacher to the board of education at one of its regular public meetings was erroneous and should be reversed?
2. Did the Court of Appeals err in ruling that the reporting of reasons for dismissal of a non-tenured probationary teacher caused a stigma upon the plaintiff without any proof that employment opportunities were foreclosed to deny plaintiff

her liberty interest under the due process clause of the Fourteenth Amendment?

3. Was the decision of the Court of Appeals holding that plaintiff was entitled to a hearing upon dismissal correct inasmuch as the defendants had no right or authority to grant said hearing?
4. Did the conference of March 21, 1975 between the plaintiff, her attorney, the District Superintendent, principals Berg and O'Shea, and the Assistant Superintendent in charge of personnel constitute sufficient due process as the Fourteenth Amendment would require of these defendants under *Board of Curators of the University of Missouri* v. *Horowitz*, ... U. S. ....., 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978).

STATEMENT OF THE CASE.

Plaintiff Ida Berger, a non-tenured teacher in the Chicago Public Schools, was dismissed by the Board of Education of the City of Chicago on April 30, 1975, in accordance with statute, Ill. Rev. Stat., 1973, chap. 122, par. 34-84.

Plaintiff was dismissed prior to the expiration of her probationary period. The General Superintendent of Schools reported in writing to the Board of Education, as he was required to do by statute, his reasons for recommending the termination of her services. A copy of said report is contained in Appendix A at page A13.

Defendants Dorothy Berg, principal of the Funston Elementary School, and Mary Jane O'Shea, principal of the Falconer Elementary School, are principals of the last two schools to which the plaintiff was assigned. Defendant Ann Lally is District Superintendent of District 5 in Chicago, Illinois, in which the Funston and Falconer Schools are located. The remaining defendants are Angeline P. Caruso, Associate Superintendent of Schools; Otho M. Robinson, former Assistant Superintendent of

Schools—Personnel; James F. Redmond, former Superintendent of Schools; and Manford Byrd, Jr., Deputy Superintendent of Schools.

On July 20, 1970, plaintiff Ida Berger applied for and was granted a temporary teacher's certificate as a substitute teacher in the Chicago Public Schools. Plaintiff was employed as a substitute teacher during the 1970-1971 and 1971-1972 school years.

On October 29, 1971, plaintiff was issued a regular teacher's certificate after passing an examination and was placed on an eligible list awaiting appointment from said teachers' eligible list. Plaintiff was appointed off the eligible list on her regular certificate to the Brown Elementary School effective September 4, 1972, and began her three year probationary period. Upon the satisfactory completion of this three year period, Ms. Berger would gain tenured status.

Ms. Berger taught at the Brown School during the 1972-1973 academic year. She was transferred to the Funston Elementary School for the 1973-1974 year under principal Dorothy Berg. While assigned to the Funston Elementary School, Ms. Berger pursued a course of erratic behavior that brought her into conflict with her students, their parents, and her superiors. She made constant complaints to her principal, failed to provide her students with an adequate course of instruction, harassed the parents of her students, and made calls to the Chicago Police Department to send police officers to her classroom to help her enforce discipline (A13).

On January 2, 1975, Ms. Berger was transferred to the Falconer School in an attempt to remedy her situation and provide her with a new environment in which to teach. Her situation did not improve and her rapport with students, parents and her superiors became worse. She refused to submit to a medical examination requested by the General Superintendent of Schools under the rules of the Board unless her attorney was present during the medical examination.

Since conferences with her two principals did not seem to improve her performance as a teacher, a meeting was held in the Department of Personnel at which the plaintiff, her counsel, Dr. Otho Robinson, Ms. Berg, Ms. O'Shea, and a representative from the Board's legal staff were present to discuss Ms. Berger's problems on March 21, 1975. The meeting was an attempt to remediate Ms. Berger's present conduct and insubordination. The meeting ended when Ms. Berger's counsel kept demanding formal written charges rather than discussing the problems at hand.

The Board of Education dismissed Ms. Berger from her position as a probationary teacher at one of its regular meetings on April 30, 1975, after the General Superintendent of Schools provided the Board with a report containing Ms. Berger's erratic behavior and recommended her dismissal as a non-tenured teacher from the Chicago Public Schools pursuant to State statute. Plaintiff's dismissal was effective as of May 2, 1975.

Ms. Berger filed this action in the United States District Court for the Northern District of Illinois, Eastern Division, alleging that she was terminated without a tenure-type hearing before the Board of Education and that her due process rights were violated. Judge Joseph Samuel Perry granted the defendants' motion for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff appealed from the District Court order granting summary judgment for defendants. A divided panel of the Court of Appeals for the Seventh Circuit rendered its opinion in this matter on December 20, 1977. The Court of Appeals reversed and remanded the case to the District Court. This action Mr. Justice Pell, dissenting, characterized as a needless and unfortunate waste of judicial manpower. The Court of Appeals further found that the defendants violated the plaintiff's liberty interest under the Fourteenth Amendment by reporting the reasons for her dismissal to the Board of Education for consideration as is required by statute.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals holding that the giving of written reasons to the Board of Education by the General Superintendent of Schools for plaintiff's dismissal as a teacher as required by State statute was a violation of plaintiff's liberty interest under the Fourteenth Amendment is a compelling reason for the Supreme Court of the United States to grant a Writ of Certiorari in this matter.

This ruling reversed the District Court's ruling in favor of the defendants after full consideration of the defendants' motion for summary judgment. The Court of appeals placed itself in the position of the District Court and issued a decision that is clearly erroneous on the law as it exists in other circuits and in past pronouncements of the Seventh Circuit.

The Court of Appeals bases a major part of its opinion on *Board of Regents of State Colleges* v. *Roth*, 408 US 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); yet it clearly misapplies the *Roth* standards. In *Roth*, the plaintiff was an assistant professor at a State university. He was not tenured and was informed that he would not be rehired after his first year of teaching. He alleged that he was denied his due process rights under the Fourteenth Amendment since he was not afforded a hearing at which he could defend himself. The Supreme Court reversed the Trial Court and the Court of Appeals, both of which had held for the plaintiff Roth. Mr. Justice Stewart, writing for the majority, said that the State did not make any charge against Roth that might seriously damage his standing or association in the community. There was no suggestion that the State imposed on Roth a stigma or other disability that foreclosed his freedom to take advantage of other opportunities. Roth was free to seek another position as was the plaintiff in this case. In support of the proposition that Roth was not denied his liberty interest under the 14th Amendment, the Supreme Court stated in pages 573 and 574 of its opinion as follows:

> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .'"

There is no showing anywhere in the present proceedings that plaintiff Berger was foreclosed and denied employment other than by the Board of Education of the City of Chicago after the reasons for her dismissal were transmitted by the General Superintendent of Schools to the Board of Education. In fact, there is no showing that plaintiff Berger even sought further employment. The Court of Appeals stretched the *Roth* decision to an unreasonable extension when it stated in essence that the publication of the reasons for dismissal are a denial of her liberty interest when said reasons are required of the General Superintendent of Schools by Ill. Rev. Stat. 1973, ch. 122, par. 34-84, stated as follows in relevant part:

> "34-84. Sec. 34-84. Appointments and promotions. Appointments and promotions of teachers, principals and other educational employees shall be made for merit only, and after satisfactory service for a probationary period of 3 years (during which period the board may dismiss or discharge any such probationary employee upon the recommendation, *accompanied by the written reasons therefor, of the general superintendent of schools*) appointments of teachers and principals shall become permanent, subject to: (1) termination by compulsory retirement at the age of 65 years; (2) the rules of the board concerning conduct and efficiency; and (3) removal for cause in the manner provided by Section 34-85. . . ." (Emphasis supplied.)

In *Weathers* v. *West Yuma County School District R-J-1*, 530 F. 2d 1335 (CA 10, 1976), the Court of Appeals for the

Tenth Circuit considered the problem of dismissing a non-tenured teacher for cause without a hearing. The teacher claimed a violation of his liberty interest in that the reasons for dismissal allegedly stigmatized him and he had been turned down on two other employment opportunities. The Court of Appeals, in agreeing with the trial court, ruled that two attempts at future employment did not convince one that the plaintiff teacher had been stigmatized. The Court of Appeals summarized its position on page 1339 when it stated:

> "The instant case may well be one where the fact of non-renewal and the reasons therefor, if communicated, would make the appellant 'less attractive' to future employers. That is simply not enough to establish a liberty interest. We agree with the trial court that nothing present in this case indicates appellant has had such a stigma imposed upon him as to foreclose future employment opportunities."

In the case of *Gray* v. *Union County Intermediate Education District*, 520 F. 2d 803 (CA 9, 1975), the Court held that the dismissal of a special education teacher who was employed on a year to year basis did not deprive that teacher of a liberty interest by reason of the school board's failure to provide a hearing upon dismissal. At the board's hearing on the dismissal, a letter was read announcing the nonrenewal of Mrs. Gray's contract due to her "student and parent problems." Other letters were read including a letter from a former director of special education charging the appellant with insubordination, incompetency, hostility toward authority and aggressive behavior.

The Court went on to state at p. 806:

> "These allegations certainly are not complimentary and suggest that Mrs. Gray may have problems in relating to some people, but they do not import serious character defects such as dishonesty or immorality. Personality differences or difficulty in getting along with others are simply not the kinds of accusations which warrant a hearing, as contemplated by *Roth*."

In applying the *Roth* standard, the Court further stated on p. 806 of this decision as follows:

> "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperment, or character (citation omitted). But not every dismissal assumes a constitutional magnitude. The concern is only with the type of stigma that seriously damages an individual's ability to take advantage of other employment opportunities (citations omitted)."

The Sixth Circuit reviewed the question of the denial of a liberty interest in the publication of a teacher's shortcomings in *Sullivan* v. *Brown*, 544 F. 2d 279 (CA 6, 1976). In this case, the teacher was not discharged but was transferred to another school. In commenting on the teacher's federal civil rights action, the Court of Appeals for the Sixth Circuit stated at p. 284:

> "With procedural due process available to her in the State courts of Tennessee, plaintiff elected not to avail herself of procedures in State courts, which have jurisdiction, and undertake to make a federal case out of this litigation. Compare, *Graves* v. *Sneed*, 541 F. 2d 159 (6th Cir. 1976); *Ohio Inns, Inc.* v. *Nye*, 542 F. 2d 673 (6th Cir. 1976).
>
> Section 1983 was never intended as a catch-all statute under which myriads of suits, traditionally within the exclusive jurisdiction of state courts, may be filed in federal courts, in the absence of a showing of deprivation of a constitutional right. Plaintiff's right of action is within the exclusive jurisdiction of the courts of Tennessee. Under *Yoakum, supra*, 201 Tenn. at 195, 297 S. W. 2d 635, plaintiff could establish in the State courts that action of the Board of Education was arbitrary or capricious. Additionally, plaintiff might establish a claim for defamation under the laws of Tennessee."

The *Sullivan* case parallels this case in the fact that proper state remedies are available if the plaintiff believes that her reputation and standing were damaged in the community. Prior

to the filing of this action, plaintiff filed an action in the Circuit Court of Cook County against the Board of Education of the City of Chicago seeking reinstatement and back pay. This action is still pending.

The decision in the instant case is a faulty departure from the correct statement of the law in the earlier Seventh Circuit decision in *Jeffries* v. *Turkey Run Consolidated School District*, 492 F. 2d 1 (CA 7, 1974) in which Mr. Justice Stevens stated on page 3 of that decision as follows:

> "In our opinion, the questions whether a nontenured teacher, whose contract is not renewed, has any right to a statement of reasons or to judicial review of the adequacy or accuracy of such a statement are matters of state law, not federal constitutional law. There are sound policy reasons to support either a statutory requirement, or an administrative practice, that a complete and accurate written statement of the reasons for such an important decision be promptly delivered to the teacher. But since, by hypothesis, no constitutionally protected property or liberty interest of the teacher is impaired by the Board's action, she has no federally protected right to a fair hearing or to a fair statement of reasons. The fact that a state, or a School Board, may voluntarily communicate more information to her, or receive more information from her, than the Constitution requires, is not in itself sufficient to create a federal right that does not otherwise exist.
>
> A written statement of reasons may have great significance as evidence, for example, that a particular Board decision was motivated by a constitutionally impermissible reason. And, of course, an adequate statement by the defendants would not foreclose a claim that the Board was, in fact, motivated by a forbidden purpose. But the statement itself is just evidence, not an aspect of the state's legal process that is subject to federal supervision and control mandated by the United States Constitution."

It is quite apparent from a review of the above decisions, including that of the Seventh Circuit in *Jeffries*, that the *Roth* standard was improperly applied by the divided panel in this case. The

decision in the instant case conflicts with decisions of the Courts of Appeal in the Sixth, Ninth, and Tenth Circuits and is at variance with prior holdings of the Court of Appeals for the Seventh Circuit. The United States Supreme Court and all the Circuits in interpreting *Roth* have required that to establish the deprivation of a liberty interest without due process one must be foreclosed from employment opportunity by the publication of his or her shortcomings on the job. The instant decision would eliminate that requirement and make the mere disclosure of these deficiencies a violation of one's liberty interest. This would make it impossible for any future employer to obtain an honest appraisal of one whom he was considering for employment. This new standard would be especially difficult and well near impossible to comply with in the case of an agency such as the Board of Education of the City of Chicago where pursuant to statute the General Superintendent of Schools must report in writing to the Board of Education the deficiencies of a probationary teacher whom he desires to dismiss for the good of the school children.

A further area in which this holding of the Seventh Circuit conflicts with the other Circuits is in its finding that defendants in the instant case who had no contract with the plaintiff and no legal right to determine the plaintiff's contractual or due process rights upon dismissal are liable for breaches of plaintiff's property and liberty interests. In remanding this action for a determination of plaintiff's contractual and procedural rights to due process, the Court of Appeals has assigned to the named defendants responsibilities which they do not possess either in fact or in law. There is not one shred of evidence in the record which demonstrates that these defendants had any contract, either express or implied, with the plaintiff. Furthermore, there is no evidence in the record that these defendants had the authority or the power to order the plaintiff be given a hearing upon her dismissal. As was noted in *Illinois Education Association* v. *Board of Education*, 62 Ill. 2d 127, 340 N. E. 2d 7 (1975)

cited by this Court, the Board alone has the statutory power to dismiss.

The plaintiff's employer, the Board of Education of the City of Chicago, is not now and never has been a defendant in this litigation; and it alone can hire and discharge a teacher. As the record demonstrates, the plaintiff was dismissed only upon the vote of the full Board of Education. Consequently, the issue of plaintiff's purported entitlement to a hearing upon dismissal was never reached until after the decision of the Board.

The plaintiff charges that these defendants violated various of her civil rights in making the written report to the Board of Education. As the record reflects, the written recommendation submitted to the Board by defendant Redmond was required by statute. In every case which the Court of Appeals cites for the proposition that even a non-tenured teacher may in certain instances be entitled to a hearing upon dismissal, either a Board of Education or other body directly responsible for the plaintiff's employment was a named defendant. In *Lombard* v. *Board of Education*, 502 F. 2d 631 (CA 2, 1974) relied upon by the Court of Appeals, the District Court upon remand dismissed the action against the plaintiff's principal, holding that it was the Board that should have given the plaintiff a hearing upon dismissal and not the principal. 407 F. Supp. 1166, 1171 (E. D. N. Y. 1976).

Finally, this Court in its opinion in *Board of Curators of the University of Missouri* v. *Horowitz*, ... U. S. ....., 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978), recognized that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. The Circuit Court of Appeals noted in its opinion in this case that the defendants met with the plaintiff before the recommendation of dismissal had been submitted to the Board and further noted that the plaintiff and her attorney adjourned the meeting insisting that the plaintiff be presented with written charges against her. It is difficult to comprehend that the defendants in this litigation, all of whom are charged with violating the plaintiff's right to due

process *prior* to her actual dismissal by the Board, could have done anything more than to present the plaintiff with the opportunity to refute or explain her superiors' dissatisfaction with her classroom performance and conduct as a teacher. The named defendants gave plaintiff that opportunity which she failed to exercise.

CONCLUSION.

For the foregoing reasons the petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued September 27, 1976)

December 20, 1977

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ALBERT C. WOLLENBERG, *Senior District Judge**

IDA BERGER,
Plaintiff-Appellant,

No. 76-1444 *vs.*

DOROTHY BERG, MARYJANE O'SHEA, ANN LALLY, ANGELINE P. CARUSO, OTHO M. ROBINSON, JAMES F. REDMOND, MANFORD BYRD, JR., and Unknown Defendants,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-C-1400

JOSEPH S. PERRY,
Judge.

ORDER

This is an appeal by plaintiff-appellant from an order of the District Court for the Northern District of Illinois granting summary judgment and dismissal of the action in favor of defendants-appellees. The background of this case is as follows.

* Honorable Albert C. Wollenberg, Senior District Judge for the Northern District of California, is sitting by designation.

Ida Berger, appellant, was initially hired as a "full time basis substitute" by the Chicago Board of Education on September 5, 1967. Ms. Berger was approved for a temporary teacher certificate on August 24, 1970 and again on June 30, 1971. On October 29, 1971, having passed the necessary certification examination, Ms. Berger was issued a teacher's certificate, and placed on an "eligible list." On July 11, 1972 she was notified that her name had been reached on the eligible list and that she was appointed to the Brown School, effective September 4, 1972. Ms. Berger received at least "satisfactory" ratings by her supervisors from the beginning of her employment in the Chicago School System through the Spring of 1972. During the next academic year Ms. Berger was transferred to Funston School.

On June 4, 1974 appellant suffered a physical attack in her classroom which ultimately resulted in the criminal conviction of her assailant, and an $8,500.00 Workman's Compensation award for Ms. Berger. After this incident, the working relationship between Ms. Berger and her supervisors allegedly deteriorated due to their divergent opinions regarding the proper response of school administrators to an assault upon a teacher.

During the winter of 1974-75, appellant was required to submit to at least two "health examinations" which, according to appellant, were solely to examine her mental health. The first such examination, in September, 1974, was conducted in the presence of appellant's attorney and revealed that Ms. Berger was in "satisfactory" health for continued employment in the school system. In November, 1974 yet another "health examination" was requested by Board of Education officials. Dr. Abrahms, Board physician, refused to proceed with the psychiatric evaluation unless he was provided with written examples of Ms. Berger's "questionable behavior." According to appellant, because the appellees did not provide the evidentiary material, the second medical examination was never completed. On January 2, 1975 Ms. Berger was transferred from Funston to Falconer School.

After several months of increasing tensions and dissatisfaction on the part of both appellant and her supervisors, a personnel conference was held on March 21, 1975 to discuss Ms. Berger's performance as a teacher. Present at the meeting were appellant, her attorney, and several supervisory level school employees. When the appellees present at the meeting were unable to produce written charges at the request of Mr. Ditkowsky, appellant's counsel, the meeting was adjourned until such written charges could be presented to Ms. Berger. However, after the appellant and her attorney left the meeting, the appellees present decided that the urgency of the situation merited an immediate recommendation to the Board of Education and that the future meeting with appellant would be cancelled. The appellees prepared and circulated a recommendation that Ms. Berger's employment be terminated. On April 30, the Board of Education adopted the recommendation, effective May 2, 1975.

In May, 1975 Ms. Berger filed this action against the principals of the two schools at which she taught, the District Superintendent, the Assistant Superintendent and the Superintendent of Chicago Public Schools, and unknown defendants, alleging, *inter alia*, conspiracy by appellees to deprive her of her civil rights guaranteed by Article 1 and 12 of the Illinois State Constitution and the First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Appellant alleged specifically that the appellees had failed to perform their supervisory functions in the school system and had conspired both to cover up serious disciplinary problems in the schools and to deprive appellant of her civil rights. On February 26, 1976 the district court granted appellees' motion for summary judgment and dismissed the action against all defendants. Appellant has appealed.

Although appellant's complaint claims a number of defects in the school system, the case really turns on whether, in dismissing her without notice of charge and a hearing thereon,

defendants deprived appellant of property or liberty without due process.

I. Tenure.

We agree with the conclusion of the district court that appellant had not acquired tenured status within the Chicago Public School System. Illinois law provides that appointments of teachers and principals shall become permanent after a probationary period of three years. Illinois Revised Statutes, 1973, ch. 122, secs. 34-84 and 34-85. Although the "propationary period" is not defined by statute, the Illinois courts have held that such a period commences on the date of the appointment from an "eligible list" following successful examination and certification as a "teacher" by the Board of Education. *People, ex rel. Thompson* v. *Bd. of Education,* 40 Ill. App. 2d, 308, 188 N. E. 2d 237 (1963). Consequently, the period of time during which a teacher is employed as a "full time basis substitute" or "temporary teacher" is not considered part of the three year probationary period.

Appellant was placed on an "eligible list" on October 29, 1971 after successfully completing the appropriate examination requirements. Appellant was appointed to Brown School effective September 4, 1972 as a "probationary regular certificated Grades 3-8 elementary school teacher." Consequently, when appellant was discharged on May 2, 1975, she had not completed a three year probationary period, and was not entitled to tenure as provided by Illinois law.

The real question is whether a genuine issue of material fact exists as to the presence of a contract not terminable at will. Although it appears there was a collective bargaining contract which specified certain procedures for dismissal even of a non-tenured teacher, the reasoning of the *Illinois Education Association* v. *Board of Education*[1] case seems to say that a collective bargaining agreement on that subject is not binding, since the

1. 62 Ill. 2d 127, 130, 340 N. E. 2d 7, 9 (1975).

Board has statutory power to dismiss. Although *I. E. A.* dealt with a teacher not in Chicago, we have no reason to say the law is different in Chicago. It follows that the collective bargaining agreement did not create a property right of the nature of tenure.

II. Deprivations of Property Interests Without Due Process of Law.

The Supreme Court's decision in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972) is the logical starting point for an analysis of Fourteenth Amendment due process requirements as applied to non-tenured teachers. In *Roth,* the Court held that a non-tenured university teacher did not have a right to a hearing on the issue of the non-renewal of his teaching contract. The Court reasoned that because the requirements of procedural due process only apply where a person has a protected interest, it is necessary to ascertain whether the non-tenured teacher has a legitimate entitlement to continued employment.[2] Absent a finding of *de jure* or *de facto* tenure under state law, the Court determined that Mr. Roth did not have a protected property interest in continued employment and hence was not entitled, as a matter of law, to notice and a hearing on the non-renewal issue.

Although *Roth* involved non-renewal of a contract, the same constitutional analysis is applicable in a dismissal situation. Consequently, the pivotal determination in the present action is whether appellant had any entitlement to continued employment in the Chicago Public School System. If such entitlement exists, appellant should have been accorded notice and hearing under the Fourteenth Amendment.

2. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U. S. 564, at 577.

Appellant alleges that she was discharged before the end of her contract period which ran from September, 1974 until August, 1975. Appellant contends that (at a minimum) she has an entitlement to continued employment until the expiration of her contract.[3]

Appellant, as we have said, did not have tenure. The record on the motion for summary judgment does not conclusively establish that appellant had no contract right to continue teaching until August, 1975. On remand, she will be free to attempt to prove that she had such a contract, consistent with state law. If she so proves, it would follow, in keeping with the *Roth* analysis, that she was deprived of a property interest by the Board's action, without due process.

III. Deprivation of Liberty Interest Without Due Process of Law

Finally, we hold that the district court erred in granting summary judgment to defendants on the issue of the alleged deprivation of "liberty" without due process of law. Appellant alleges that the public distribution of a written recommendation, prepared by defendants and submitted to the Board of Education, defamed her reputation and standing in the community and seriously jeopardized her chances of future employment. Appellant concludes that the defamatory nature of the circulated recommendations mandated the requisite protections of procedural due process.

Distribution of a defamatory document by school officials may be sufficient to trigger the guarantees of procedural due process

3. In the absence of a contractual relationship between appellant and the Board of Education, there would be no merit to appellant's "property" claim. In refusing to acknowledge a property interest in continued employment of a permanent police officer, the Supreme Court recently noted: "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the entitlement must be decided by reference to state law." *Bishop* v. *Wood*, 426 U. S. 341, 344 (1976). Illinois law does not explicitly create an entitlement for continued employment of probationary teachers for the school year or any specific period. Illinois Revised Statutes, 1973, ch. 122, secs. 34-84 and 34-85.

when the document is distributed incident to termination procedures. In *Board of Regents* v. *Roth*, at 573 the Court recognized two situations in the course of termination proceedings wherein a teacher's liberty interests would be implicated. The first situation arises if the charges brought would seriously damage the teacher's "standing and associations in the community,": "For where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (Cites omitted.) *Roth, supra*, at 573. Secondly, a teacher's liberty interests are invaded if in the course of termination proceedings the school board imposes "a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities." *Roth, supra*, at 573.[4]

In determining which statements by a public employer necessitate notice and hearing under the *Roth* standards, courts have examined both the content of the allegations and the extent to which the allegations have been disseminated to the general public or future employers. For example, although the mere notification of dismissal (or non-renewal) from public service may color an employee's attempt to find future employment, that finding in itself is not sufficient to raise a claim of constitutional magnitude. *Roth*, 408 U. S. at 574, n. 13. Similarly, allegations of misconduct which were orally communicated to a dismissed policeman, and never recorded or posted, were held not to raise a "liberty" claim. *Bishop* v. *Wood*, 426 U. S. 341 (1976), *cf. Gray* v. *Union County Intermediate Education Dis-*

4. This analysis is not altered by the recent Supreme Court decision in *Paul* v. *Davis*, 424 U. S. 693 (1976). In *Paul*, the Court refused to recognize the "liberty" interest of a person whose name had been incorrectly listed and posted as a "shoplifter" by the police. The Court held that damage to reputation constitutes a "liberty" claim only when coupled with alteration or termination of one or more protected interests. The Court explained that *Paul* was consistent with the earlier holding in *Roth*, because *Roth* spoke of damage to reputation only in the context of termination of employment.

trict, 520 F. 2d 803 (1975) (CA-9), *LaBorde* v. *Franklin Parish School Board,* 510 F. 2d 590 (1975) (CA-5).

Conversely, the Second Circuit did recognize a constitutional violation when a probationary teacher was dismissed because of "illogical and disoriented conversation, causing requests for examination by the Medical Department, which found him unfit for duty." *Lombard* v. *Bd. of Education,* 502 F. 2d 631 (1974) (CA-2). The court found that such allegations imposed a formidable stigma on the teacher which would seriously foreclose future employment opportunities.[5]

In applying the legal precedents to the present appeal, some questions regarding the merits of appellant's "liberty" claim still exist. The record shows that once the Board of Education Committee reached its decision to terminate Ms. Berger, a two-page document listing numerous allegations of "unacceptable" conduct was widely distributed. The text of the recommendation indicates that the Board of Education Committee concluded that Ms. Berger was "guilty of conduct unbecoming a teacher and insubordination." The recommendation alleged, for example, that Ms. Berger had on approximately ninety different occasions disagreed with superiors over disciplinary matters, harassed parents and principals on fifty different occasions with telephone calls and letters, threatened students, other teachers and civil service personnel with lawsuits, disrupted the education of her students and, on several occasions, called the police to effect discipline in her classroom in violation of school policy. These allegations extend beyond limited recitations of unsatisfactory classroom performance and some readers of the recommendations could infer character shortcomings including mental instability. We conclude that this document, even though not charging immorality, is sufficiently derogatory so that its wide distribution was an impairment of liberty under *Roth,* and, therefore, due process was required. The parties have not argued the question of appropriate relief, and we leave that question to the district court.

5. The Second Circuit also found a "stigma" in the case of an ex-policeman whose personnel file contained a statement that "he had been dismissed because of an apparent suicide attempt." The Supreme Court, however, reversed, soley on the ground that the policeman did not allege the falsity of the suicide information. Such an omission, the Court reasoned, obviated the need for a *"Roth*-type" hearing which would be to "clear his good name." *Codd* v. *Velger,* 45 U. S. L. W. 4175 (1977). In the present action, it should be noted, appellant has alleged the falsity of the written "recommendation" throughout the proceedings.

The Clerk of this Court is directed to enter judgment reversing the judgment appealed from and remanding this cause for further proceedings consistent with this order.

PELL, *Circuit Judge,* dissenting. Sending this case back for further proceedings, it appears to me from the record, can only result in a needless and unfortunate waste of judicial manpower.

It needs no reading between the lines of the record presented to us to discern that the defendants, exercising their functions of operating the school system, terminated a non-tenured teacher who was seriously detrimental to the proper accomplishment of the educational aims of the school.

The complaint filed in this case, bordering on being parnoidal, broadly charges violations of the First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution against supervisory personnel ranging from school principals to the superintendent of the entire Chicago school system, all of whom supposedly have been engaged in a malicious conspiracy to put the plaintiff out of the school system, and all apparently for no other reason than their own personal gratification. While the Scopes case can remind us that persecution, indeed prosecution, of a teacher for the espousal of unpopular views may occur, there is no such element indicated in the record of this case, and when a district court grants summary judgment in a case as frivolous as this one I would let that judgment stand.

Regrettably, the district court did not spell out its *ratio decidendi;* however, turning to the record, it appears to me that

this non-tenured teacher received the due process to which she was entitled by virtue of her status. She was given a meeting with school authorities who were willing to discuss with her and her attorney the difficulties which she was causing in the school where she was purporting to teach. The attorney's tactics on that occasion subverted the effort. Thereafter, the authorities, quite properly, in my opinion for the good of the system, took the termination action.

I would affirm the district court judgment and therefore respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

IDA BERGER,
Plaintiff,
vs.
DOROTHY BERG, et al.,
Defendants.
No. 75 C 1400

ORDER AND JUDGMENT

This cause having come on to be heard on motion of the defendants, and each of them, for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the case, the motion for summary judgment, the plaintiff's answer thereto and the briefs filed herein, now finds that there is no genuine issue of fact to be submitted to the trier of fact and concludes that defendants are entitled to a judgment as a matter of law.

It is therefore ORDERED that the defendants' motion and the motion of each defendant for a summary judgment are in all respects granted; and

It is further ORDERED that judgment be entered herein in favor of the defendants and each of them, dismissing this action, with costs and disbursements to be taxed by the Clerk, in favor of the defendants and each of them and against the plaintiff.

ENTER:

/s/ J. S. PERRY,
Judge

Dated: February 26, 1976

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 31, 1978.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ALBERT C. WOLLENBERG, *Senior District Judge**

IDA BERGER, *Plaintiff-Appellant,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-1444 *vs.*	
DOROTHY BERG, MARYJANE O'SHEA, ANN LALLY, ANGELINE P. CARUSO, OTHO M. ROBINSON, JAMES F. REDMOND, MANFORD BYRD, JR., and Unknown Defendants, *Defendants-Appellees.*	No. 75-C-1400 Joseph Sam Perry, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitle cause by counsel for the defendants-appellees, a majority of the original panel** having voted to deny a rehearing, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Senior District Judge Albert C. Wollenberg of the Northern District of California is sitting by designation.

** Circuit Judge Wilbur F. Pell, Jr. voted to grant petition for rehearing.

OFFICE OF THE SECRETARY
BOARD OF EDUCATION—CITY OF CHICAGO

75-426-1 April 9, 1975

TERMINATE SERVICE OF PROBATIONARY TEACHER

To the Board of Education of the City of Chicago

The General Supertintendent of Schools Reports

That Miss Ida Berger was assigned to the Brown Elementary School on September 4, 1972 as a probationary teacher; that during the 1974-1975 school year prior to satisfactorily completing the three year probationary period required by the Illinois School Code for attainment of tenure, while in teaching assignments at the Funston and currently at the Falconer Elementary Schools she has been guilty of conduct unbecoming a teacher and insubordination in that she has sent over ninety written memos to her principals requesting that immediate corrective action be taken in matters which reportedly related to children in her classes; that when the principals responded to the urgent nature of the memos they found that no emergency existed; that it is a matter of record that she caused the principals and parents of students to receive and deal with over sixty telephone calls, the majority of which were a threatening harassing nature, making unfounded charges and bizarre statements; at least once impersonating a parent to intimidate other parents with the threat of a lawsuit; that she has visited the principals' offices on more than thirty-five occasions usually in a confrontation-type situation leveling numerous charges against said principals; that she has informed the principal of Falconer that she does not have to do what the principal says; that in the majority of instances when children were referred to the principal on numerous occasions their infractions were minimal; that there is written documentation that parents and

peers have officially protested her behavior in the schools; that on one occasion a group of parents accompanied police officers to the school to arrest Miss Berger, an action which the principal was able to avert; that the record shows that on more than 50 occasions Miss Berger has threatened students, parents, teachers, civil service personnel, line and Central Office administrators with lawsuits if her demands would not be met, thereby antagonizing parents, disrupting the education of her students, and usurping the time of her superiors; that on more than five separate occasions, in violation of school policy and in violation of the directives of her superiors Miss Berger personally summoned police officers to her classroom ostensibly to effect the discipline in her classes which had deteriorated, when in fact there were no serious discipline situations, thereby causing her superior to spend an inordinate amount of time explaining to the police why they could not be allowed in the classroom, and explaining the arrival of the police to concerned staff, students and parents; that she has removed attendance books and cumulative card records regarding her students from her classroom repeatedly, in direct violation of specific directives to her by her principals; that on January 31, 1975, in accordance with Section 4-44 (Health Examinations) of the Rules of the Board of Education she was directed by the General Superintendent of Schools (Acting) to report to the Medical Department on February 4, 1975 for a health examination, and that she refused to submit to said health examination without her attorney being present; that in spite of continued serious efforts by line administrators in two different assignments to be of assistance and to respond to her numerous requests and demands, the insubordinate manner and frequency of those requests and demands continue to seriously disrupt the educational program, no improvement in her conduct has been evident, and it is deemed, therefor, that her unbecoming conduct and insubordinate behavior are irremediable; that on March 21, 1975 a conference was held in the Department of Personnel

with the District Superintendent, the Principals of Funston and Falconer Elementary Schools, the Assistant Superintendent in Charge of Personnel, Miss Berger and her attorney, during which her unbecoming conduct and insubordinate behavior, as set forth above, were discussed.

The General Superintendent of Schools Therefore Recommends

That the service of Ida Berger as a probationary teacher be terminated effective April 11, 1975 and that she be dismissed from the service of the Board of Education for the reasons hereinabove set forth effective on that date.

Prepared by:

OTHO M. ROBINSON,
Asst. Supt.-Personnel

Approved by:

ANGELINE P. CARUSO,
Area C Assoc. Supt.

Approved as to legal form:

MICHAEL J. MURRAY, *Attorney*

Respectfully submitted,

Respectfully submitted,

JAMES F. REDMOND
General Superintendent of
Schools (Acting)

MANFORD BYRD, JR.,
Deputy Supt. of Schools